

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

* Case No. 18-CR-204 (NGG)

*

* Brooklyn, New York
* February 05, 2019

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v.

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KEITH RANIERE, et al.,

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Defendants.

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TRANSCRIPT OF CRIMINAL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE VERA M. SCANLON
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording,
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1 (Proceedings commenced at 5:06 p.m.)

2 THE CLERK: Criminal cause for a status conference,
3 Case No. 18-CR-204, United States v. Raniere, et al.

4 Counsel, please state your name for the record
5 starting with the government.

6 MS. JONES: Shannon Jones and Phillip Pilmar for
7 the United States. Good afternoon, Your Honor.

8 MR. PILMAR: Good afternoon, Your Honor.

9 THE COURT: Tell me your last name again.

10 MR. PILMAR: Pilmar.

11 THE COURT: Pilmar. Okay.

12 MS. CASSIDY: Good afternoon, Your Honor. Kathleen
13 Cassidy and Caroline Grosshans on behalf Clare Bronfman.

14 THE COURT: Okay. You all in the back look
15 familiar.

16 MR. AGNIFILO: Hi, Judge. We're just loitering.

17 THE COURT: Do you want to make an appearance here?

18 MR. AGNIFILO: Yeah, we're all here. Marc
19 Agnifilo, Paul DerOhannesian, and Teny Geragos for Keith
20 Raniere.

21 I don't think we're on the calendar, but we're here
22 if anything comes up.

23 THE COURT: Okay. So, did your client want to
24 attend?

25 MR. AGNIFILO: No. He's --

3 MR. AGNIFILO: Yeah. So we actually, we just had a
4 hearing --

5 THE COURT: Right.

6 MR. AGNIFILO: -- in front of Judge --

7 THE COURT: Yeah, I just heard. Uh-huh.

8 MR. AGNIFILO: Yeah, Garaufis. So we're adjourned
9 until tomorrow when they're back in front of Judge Garaufis,
10 so he does not want to attend this proceeding. Thank you.

11 THE COURT: Okay. So he waives his appearance.

12 MR. AGNIFILO: He does. He does.

13 MS. CASSIDY: And Ms. Bronfman waives her
14 appearance as well.

15 THE COURT: Okay. Does anybody else want to sit up
16 with attorneys? I mean, you know, feel free to move around.

17 MR. AGNIFILO: All right, Judge.

18 THE COURT: Okay. So I don't know who everybody is
19 in the courtroom and the courtroom is open.

20 That being said, I'm going to leave it to counsel
21 to flag for me if we start to talk about something that is on
22 -- is privileged, because that's the sort of -- that's the
23 issue that we're looking at here. So -- all right.

24 So I hope this conference can be a -- I'm trying to
25 get a practical way to deal with this -- these issues.

1 So, I asked the team here, because what I have is -
2 - I'm sorry. Let me just step back just so you know
3 something, which is that there was a letter from Mr. Shapiro
4 today.

5 It was raised having argument about the motion to
6 suppress. I believe Judge Garaufis is going to refer that to
7 me, so what we say here might touch on that. But just so you
8 have that as the background.

9 The motion that we have with regard to the
10 privilege obviously comes from the trial team.

11 MS. JONES: That's correct, Your Honor. And they
12 are not here.

13 THE COURT: They're not here.

14 And the reason I didn't ask for them to come, and
15 this is going -- this touches back on this possibility that
16 we might talk about something that's privileged.

17 And you're going to have to let me know who should
18 or shouldn't be hearing that, because I don't want to be part
19 of the process of waiving anybody's privilege.

20 I'm not asking anyone to do that -- is conceptually
21 and, you know, maybe I introduced the problem, or at least
22 fed the problem was, were there some overarching issues that
23 could help deal with some categorical -- some privileges that
24 apply to categories of documents to try to move this whole
25 process along because we had this conversation late last year

1 when you were looking at an even sooner trial date.

2 But you know, it's really approaching very quickly,
3 and so how to get through whatever the mass of documents are,
4 and I'm going to ask you about that in a minute.

5 So what I have from the trial team obviously, is
6 this motion. And I would say, correct me if I'm wrong, it
7 really tries to deal with two issues from the government's
8 point of view.

9 One, the immigration related documents. And this
10 is as I said, the trial team knowing what they know, and I'm
11 not entirely clear what it is that they know, projecting on
12 to what they assume exists, which the taint team then would
13 know about maybe, if you'd gotten to these documents. But
14 that's one category, immigration.

15 And the other is this idea that there has been a --
16 there should be an exception to the privilege because the
17 communications are either in and of themselves crimes, or
18 they are -- they're conduits to crimes being committed, or
19 whatever, some variation on that, so the crime fraud
20 exception should apply.

21 Sort of a third way of looking at this usually
22 comes from defendant, which is saying, you know, this is
23 totally the wrong approach. You can't do this categorically,
24 at least without some samples, basically. We need to know
25 what you're talking about, and even really, judge, we should

1 be able to work a lot of this out.

2 That is what I see as the overview here, so I have
3 the practical questions, which is -- are generally about, how
4 does this fit in with the overall work of the taint team,
5 secondarily with the trial team, and your, you know,
6 preparation, trying with maybe some more urgency to sort of
7 dig in and see what can we do to get these privilege issues
8 resolved.

9 I think -- I have reservations about this idea that
10 we can do it without -- we can make these decisions without
11 looking at at least some of the documents through a sampling
12 approach. But let me just ask some -- to get just a
13 perspective on what you're looking at.

14 Okay. So, I think there's the very big question
15 which is, you have a lot of material. There has been this
16 ongoing dispute about where do these materials fall within
17 the warrants. And so actually there is the suppression
18 issue.

19 But even from your perspective, you know, are we
20 looking at the terabytes of data that we had, or obviously
21 you've some -- many searches, it sounds like, from what you
22 have -- what you and your colleagues, and then you've U.S.
23 Attorney's have said about your efforts to segregate
24 documents based on the lawyers and law firms that are
25 identified by the information provided by the defendants and

1 entities related to the defendants.

2 So, you know, you've processed the materials, but I
3 don't have a handle on what you think is what you've covered
4 or what you think remains to be covered. And then these two
5 broad swaths of documents maybe, or not. I'm not really
6 sure.

7 Ones that fall under the immigration category.

8 Ones that the crime broad exception applies, and just to get
9 a heads up on what else you see.

10 I'm trying to make this a working conference. This
11 is really -- so cut to the chase. Let's --

12 MS. JONES: Your Honor, it's very difficult to be
13 discussing -- for the taint team to be discussing some of
14 these issues which have been raised and briefed by the
15 prosecution team, because they relate to legal issues and
16 they relate to the legal -- to the facts of the case rather
17 than the content of the material that we're looking at.

18 So I think the idea with the motions that the trial
19 team has raised, and they've asked for oral argument on those
20 if there is a question about it, relate to assertions of
21 privilege that they do not think have a basis in law, which
22 related to the joint representation and the common interest
23 for the immigration documents.

24 THE COURT: The two theories under the immigration,
25 right.

1 MS. JONES: And so if that was resolved on the law,
2 which when the government has taken the position that that
3 privilege is the burden on the defendant and they haven't met
4 that burden to show that that privilege would exist where
5 there are these three parties to a communication, the
6 potential visa applicant, the potential, I guess, employers,
7 or Ms. Bronfman in certain circumstances, and the attorney,
8 that is a legal issue and that would deal with, you know, I
9 think several hundred documents if it was just like
10 determined if those documents that fall in that category are
11 not privileged.

12 Let's put that aside.

13 THE COURT: But don't put it aside yet because my
14 question is, how do I make that decision abstractly because
15 it seems like there's a lot of different pieces to that.

16 So there are various people and the entities
17 involved, and your -- the working theory, if drafted by the
18 trial team, seems to be a couple of things.

19 One, that there are -- there's not an alignment of
20 interest between Ms. Bronfman and the parties who she's
21 helping, so that there is no common interest and there is no
22 joint representation. But the materials that are described
23 are ones that are not privileged.

24 So you know, I understand you're saying they
25 developed the argument. From what I can tell, they developed

1 the argument based on information they have seen.

2 But for me to have this -- how do you analyze this
3 without actually looking at a document, right? Because it
4 seems like there's variations, right?

5 There are different entities that are involved.

6 There's different party -- or not parties. There's different
7 individuals who are the potential beneficiaries of the
8 immigration benefits. Obviously, much of the discussion is
9 about MV.

10 But without looking at something and saying, okay,
11 well, this is -- this is purely hypothetical, but this is Ms.
12 Bronfman, she's working with this entity which she retained.

13 She's doing it in her capacity as an officer of
14 this entity, so you have that relationship, and then you have
15 whomever, because it's not completely clear to me that
16 everyone who the government is speculating there are
17 documents about, what their status is. Are they employees?

18 And obviously there's this email about MV, which
19 has the sort of, I think it's the tripartite theory, you
20 know, which they're saying, well maybe we could, you know,
21 get a visa under this, or maybe we could get a visa under
22 that, or maybe under this, right?

23 But without looking and saying, you know, who is
24 the -- what's Ms. Bronfman's role, what is she doing in the
25 communication, who is she communicating with, and what -- who

1 is or what is the other party that would be benefitting from
2 the immigration status that they're, you know, seeking to
3 achieve, it seems like, I mean, to go to the most basic, it's
4 like, what's the case or controversy? I don't even know --

5 MS. JONES: Your Honor --

6 THE COURT: -- what we're talking about.

7 So that's my concern. I know I -- maybe I'm
8 responsible for a little bit of this mess because I, you
9 know, asked that question, whether there were some
10 overarching theories. But --

11 MS. JONES: Your Honor, let me -- I'd like to
12 separate two different categories of documents within that
13 category.

14 I think what you're talking about is that there may
15 be -- there may be situations where Ms. Bronfman, in her
16 capacity as a member of one organization or another, has
17 counsel. And she's communicating directly with her counsel
18 about immigration related matters for --

19 THE COURT: Or the entity's counsel.

20 MS. JONES: -- potential employees.

21 THE COURT: Depending.

22 MS. JONES: Right?

23 THE COURT: Uh-huh.

24 MS. JONES: And I don't -- I think that that may be
25 something where we can think about whether or not there's

1 more of a case by case analysis, depending on what the
2 company is and what the attorney is, and who they're talking
3 about.

4 However, I think what -- and again, I'm very
5 uncomfortable arguing this on behalf of the trial team
6 because they made this motion.

7 But I think that what they are talking about are
8 situations where there is a visa applicant also in the
9 communications, which they say, that is a -- and even if
10 there was an attorney -- a valid attorney/client privilege
11 between Ms. Bronfman or her entity and the attorney, putting
12 the visa applicant on it destroys that privilege.

13 And alternatively, if there is an attorney/client
14 privilege between the visa applicant and an attorney, even if
15 that attorney sometimes also represents Ms. Bronfman in other
16 situations, but that attorney is representing the applicant,
17 and then they forward those emails or communications to Ms.
18 Bronfman, that three-part thing is what I think the trial
19 team is arguing in their papers. That's a waiver, and that
20 there is no common interest.

21 As a matter of law, there is no -- and there's no
22 joint defense as a matter of law that would preserve the
23 privilege in that three-party situation.

24 THE COURT: So the problem I have with -- that
25 might be correct in some circumstances.

1 So just by way of hypotheticals, and I don't know
2 what these documents are, it would seem to me that depending
3 on the kind of application for an immigration benefit, one
4 we're contemplating.

5 So if you thought about something that was
6 hypothetically -- and each one would be a visa, right? The
7 model for that is, there's no American who can do the job.

8 And so in that situation, what the company has to
9 do is advertise for the job and go through a whole -- the
10 whole effort of trying to hire somebody.

11 And then, you know, the thought is, we can't find
12 somebody or the potential visa applicant is the most
13 qualified person of all of that.

14 So in that, the employer has certain obligations to
15 the Department of Labor, and then following on to the
16 immigration authorities with regard to really the U.S. labor
17 market, and then our best candidate, and then the applicant,
18 whether he or she is otherwise qualified.

19 You could see there, there is a spectrum of
20 interest and they may not be on the same page. And it may
21 not be that they have the same legal interest, because maybe
22 you are the best candidate, but you have a criminal record,
23 you have -- you overstayed. You know, there's some problem.

24 And so, you know, you don't necessarily want to
25 tell your employer, your punitive employer. Anyway, each of

1 them may have separate interests, even though maybe they at
2 other points have a common interest.

3 But take a family, right? I mean, a husband and
4 wife. So if a U.S. spouse is sponsoring someone from -- they
5 marry someone from another country, that visa, those two are
6 so entwined that you would expect them to have the same
7 counsel. I mean, the family story is the family story.
8 Those two are not adverse. They have no separate obligations
9 to the United States.

10 So just using it as -- those two as an example, or
11 examples of how in an immigration context, the particulars
12 matter as to whether the parties' interests align, so it's
13 not -- it can't just be we have two individuals and a lawyer,
14 and that blows the privilege. You know.

15 So without looking at the documents or knowing more
16 about what was being done with regard to the immigration
17 process, I'm not sure how -- how do you make the decision
18 with regard to whether there is or isn't a -- either of the
19 possibilities or the theories that's being offered.

20 And so, you know, that -- I hear what you're saying
21 is that you didn't write the brief, but how do I have that
22 conversation with the trial team? They don't know what the
23 documents are.

24 MS. JONES: No. But again, some of these are legal
25 issues, which would cut through, I think. That was the idea,

1 was that hopefully we could cut through like doing --

2 THE COURT: I'm still looking for a way to cut
3 through. I'm just hoping it's with you and --

4 MS. JONES: Your Honor --

5 THE COURT: -- and you all who know much more about
6 what the documents actually are.

7 And, you know, obviously, one of the strands of
8 this whole analysis is, you know, do we get to the point
9 where there need to be in camera review. And I'm trying to
10 figure that out. So --

11 MS. JONES: Well, Your Honor, let me back up and
12 just give you kind of like a, like a -- what our position is
13 on the documents and what we have been doing. Okay?

14 So right now we have in our -- we have like a taint
15 database of documents that are segregated away from the
16 prosecution team, that just the taint team has access to.

17 And I think everybody agrees, and counsel for Bronfman
18 agreed to this in her response to government's memo on the
19 privilege issues, that many of these documents are not
20 privileged.

21 And so the priority of the taint team has been
22 trying to figure out ways to quickly identify things that
23 everybody agrees are not privileged and try to toss them over
24 to the prosecution team.

25 THE COURT: Okay. So just to have an example, is

1 that the Raniere communication?

2 MS. JONES: Well, for example, they gave us those
3 charts of who represented who and what was the scope of the
4 representation, and there were some specific notations where
5 a party may have said, we're not asserting privilege over
6 this, or we're not asserting privilege over that.

7 So we have attempted to do searches to go through
8 the documents we have to identify all those.

9 And then, we're not just saying, okay, now we're
10 going to give them to the prosecution team. We have been
11 doing a process where we send the list to the defense counsel
12 of, these are all the documents --

13 THE COURT: Right.

14 MS. JONES: -- document by document that we've
15 marked as not privileged either because it appeared that they
16 already had agreed they were not privileged, or it looked
17 from the face as we were clicking through documents, that
18 they weren't privileged. And then they've gotten back to us
19 and for the most part to say, we agree or we disagree.

20 So we've done that twice so far, where we've
21 identified a little over 2,000 documents which we -- which
22 appeared to be not privileged to us. And they've gotten back
23 to us.

24 The first round, I think, was the less
25 controversial one because we were really just relying on

1 their charts as to like what is and is not within the scope.

2 And that, we're down to like I think about 30 documents that
3 are in dispute as -- between the parties as to whether or not
4 they're privileged.

5 For the second tranche where --

6 THE COURT: All right. So that -- just so I -- the
7 first tranche you've -- you agree, except for about 30
8 documents --

9 MS. JONES: Yeah. Out of about 1,000.

10 THE COURT: -- and this is based on -- okay.

11 MS. JONES: Okay. And that took like -- you know,
12 it was over Christmas and New Year's, but it did take like
13 several weeks, particularly since a lot of the privilege
14 asserted belonged to NXIVM, and they had to get involved in
15 the process and that took -- that delayed things a little
16 bit.

17 The second tranche, I mean, we've also had
18 conversations where they've made clear to us that they're
19 waiting for us to designate things as not privileged.

20 And so, I'm really not going to even -- I have
21 asked some questions, and I have gotten some responses, but
22 it basically has been kind of like, the burden is on you to
23 go through these and tell us what you think is not
24 privileged.

25 So for the second one we are -- we put things that

1 I think are a little bit more -- there's not as much
2 agreement. So with the second set of documents, there were
3 about 1,200 that we sent over, and right now --

4 THE COURT: Is it 1,200 pages, 1,200 documents?

5 MS. JONES: Twelve hundred documents.

6 THE COURT: Okay.

7 MS. JONES: And so those 1,200 documents, there are
8 about 330 that counsel for Bronfman has disputed that they're
9 -- says that they're privileged, despite our -- we're
10 thinking that they're not.

11 And then counsel for Raniere initially told us
12 about 140 were not privileged, but has come back and I think
13 has narrowed it down to like 30 to 40.

14 Counsel for Bronfman has given us some explanations
15 as to -- again, this is a bit of a slow process. Like, after
16 she gave us the list, about a week later she gave us the
17 explanations as to why she thinks these documents are still
18 privileged. And we're still waiting for that explanation
19 from Keith Raniere.

20 And there has -- with the first set, there was a
21 little bit of a back and forth and we both changed positions
22 where we agreed on a couple, they agreed on a couple.

23 And for the second set, I think there will probably
24 be a little bit of that too. But I think there are probably
25 about 10 different areas right now where there is a dispute

1 between the parties as to whether or not documents are
2 privileged.

3 And I'm not going to talk about content, but there
4 are like some overarching legal issues that I think it's just
5 going to come down to a matter of law.

6 For example, there are a lot of oral common
7 interest agreements that are being asserted as to whether or
8 not something is privileged.

9 Counsel for Bronfman has told me that her position
10 is based on case law that the legal interest has to be
11 similar, not identical.

12 There are other case law cases in this district, in
13 this circuit, in this district that are more recent that say,
14 no, they have to be identical.

15 So there is this like, legal issue, common
16 interest, identical or similar, what's good enough, and where
17 do these documents fall in.

18 Again, we have the immigration documents. There
19 are a lot of those. And then we have some large categories
20 of documents for like the 330 that are currently in dispute
21 with Ms. Bronfman, about half of them I think the dispute
22 will come down to whether or not a party is being retained
23 for legal services or for some other services, primarily like
24 something that's beyond the scope of legal representation but
25 more like public relations.

1 So we have like -- we'll have arguments about is
2 this, is this in aid of an attorney's representation and to
3 provide legal vision, or is this -- is this a PR campaign.

4 So we -- I think what we can do is what we will do
5 is we can go back to defense counsel and say, of these
6 documents that are currently in dispute -- and again we're
7 waiting for counsel for Raniere to clarify which ones they
8 really are disputing -- we can say, this is where like kind
9 of we are not in agreement and it appears we may not be able
10 to work it out.

11 So we can start putting together categories of in-
12 camera documents that they can raise for you for in-camera
13 review and explain why they think it's privileged.

14 I think once we have some preliminary decisions on
15 some of those, it may address other documents that have not
16 yet been reviewed.

17 THE COURT: Are you proposing you're going to do
18 that, or the -- I mean --

19 MS. JONES: I could tell them this is where we do
20 not agree.

21 THE COURT: Okay.

22 MS. JONES: So the privilege -- the burden is on
23 you to support that the documents are privileged.

24 So we can -- I can certainly provide a framework
25 of, these are the documents, and these are the areas that we

1 have a, like a dispute, and this is kind of the basis for the
2 dispute.

3 And they can decide, are we -- do we want to find
4 that? Are we going to put this before the judge and argue
5 that these documents are in fact privileged.

6 THE COURT: Okay. Just to go back to my
7 immigration category.

8 So you're saying the -- does the trial team's brief
9 cover the disputes related to the immigration documents which
10 appear to be a subset of the about 330 documents?

11 MS. JONES: There are, let's see, I think there are
12 about -- to be honest, Your Honor, when we realized that this
13 was hopefully going to be resolved on a legal ground, we did
14 not focus on immigration matters.

15 We do have about 40 documents right now that we
16 have on our sheets that we said, these are not privileged.
17 They say they are privileged. So we do have like a sampling.

18 But it's not all of them because we were kind of
19 hoping that this would be resolved on the law, and we
20 wouldn't have to do it document by document.

21 But I think there is -- there is probably enough
22 documents that if you wanted to get like a flavor of like,
23 what are we talking about here, then there are enough
24 documents that are marked that you could certainly go
25 through, you know, go through them and see them.

1 THE COURT: Okay. So that's -- so set A, you have
2 about 30 that are in dispute. Set B, for tranche B, Bronfman
3 has about 330, Raniere 30 or 40, and then --

4 MS. CASSIDY: Your Honor, I think it -- if you
5 count, or if you just counted unique --

6 THE COURT: Are they overlapping?

7 MS. CASSIDY: -- email chains, there are many, many
8 duplicates, and there are many documents within the 330 that
9 are pieces of an email chain.

10 MS. JONES: Right.

11 MS. CASSIDY: So we estimate that it's really about
12 82 unique email chains.

13 MS. JONES: That may be correct. And, Your Honor,
14 when I say 322, that includes both tranches 1 and 2.

15 THE COURT: Okay.

16 MS. JONES: I combined them and --

17 THE COURT: Okay.

18 MS. JONES: -- so, so 322 for Bronfman.

19 And Ms. Cassidy is correct. There are a lot of
20 duplicates but they come up on our searches that way and we
21 just click and move on.

22 THE COURT: All right. Just, you know, this is a
23 case where we've been talking about gigabytes and terabytes,
24 so I just want to know where you are.

25 MS. JONES: Yeah.

1 THE COURT: All right.

2 MS. JONES: And then for Mr. -- for Defendant
3 Raniere, it's a much smaller number, but I don't know what it
4 is because it hasn't been finalized yet.

5 THE COURT: Okay.

6 MS. CASSIDY: I'll just add that it's about, I
7 think, 30 to 40 emails, but I think three or four email
8 chains.

9 THE COURT: Okay.

10 MS. JONES: And, Your Honor, as you can see, like
11 this is, this is only like 2,000 documents out of like
12 67,000.

13 And I think that number will go down a lot for --
14 there's like -- there is a pile of documents in there that
15 hopefully will get moved out and won't be part of this
16 process.

17 But there are, at least, I think, 30 to 40,000
18 documents that we still need to review. So this is not going
19 to be -- it's not like this is going to resolve everything.

20 THE COURT: Okay. Hold that thought for one
21 second.

22 So there's these two tranches. Is there another,
23 or are there other groups that you know about, or you haven't
24 had a chance to dig in yet and say, we think there's another
25 3,000 that -- I'm making up the numbers, you know -- 2,000,

1 3,000 that fall into this category and this category, besides
2 the one that you just mentioned that might get moved up?

3 MS. JONES: Your Honor, I can't really say that
4 there is because we try to get like a good -- I mean, we're
5 continually reviewing documents, but we like to get like a
6 good number together to send over to defense counsel so they
7 can like, click through them and make -- like agree or not
8 agree so we can move them, move them out.

9 So that process of like basically document by
10 document, this is what we think, this is what you think, we
11 agree, we disagree, we're back and forth, and then it does --
12 it takes a while which is why this is -- we're concerned
13 about the trial date.

14 THE COURT: As am I. That's why --

15 MS. JONES: We're also concerned --

16 THE COURT: -- we're here.

17 MS. JONES: -- about like, we have been trying to
18 do the easy calls first, the ones we think that there's not
19 going to be dispute, that where we can see that there seems
20 to be like a waiver because people are on documents who
21 shouldn't be.

22 But we are trying to, you know, try to figure out
23 how to do smart searches so we can -- we may not get through
24 everything, so we want to focus on the things that look like
25 it's not going to be easy either. Easy calls are things that

1 like look like they're really important.

2 THE COURT: So given the trial date, what's your --

3 MS. JONES: We're just moving as fast as we can,

4 Your Honor, which is why we were hoping that we could resolve
5 some of these legal issues.

6 And then with these, if we could get through --
7 hopefully, let's do this in-camera process, and then once we
8 get to some decisions, then hopefully that will make it --
9 there will be less back and forth because we will know this
10 is what the Court has ruled and we can get on the same page
11 and just move forward.

12 Or maybe we'll be able to work some things out. I
13 don't know.

14 THE COURT: Okay. All right. Your thoughts on how
15 do this and -- well, generally.

16 MS. CASSIDY: You know, I think, Your Honor, you
17 articulated a lot of the concerns that we have about the
18 process.

19 I mean, I think fundamentally this is a document
20 specific analysis, particularly in the area of immigration
21 and it's not possible to cut through this with a one -- you
22 know, with a legal ruling in the abstract.

23 There are endless variations of, you know, Ms.
24 Bronfman is the head of for and the Executive Board of NXIVM,
25 and this is a NXIVM employee, and the type of visa, or

1 another entity that she is working on behalf of. And I don't
2 think it's possible to do that without looking at the
3 documents.

4 I do not believe -- the second tranche, I think,
5 has a few immigration documents, but my sense is the vast
6 majority of immigration documents are not within either of
7 those first two tranches. So we haven't really --

8 THE COURT: Why not?

9 MS. JONES: Oh, they're --

10 MS. CASSIDY: -- dealt with those.

11 MS. JONES: I mean, again, we've been --

12 THE COURT: You pushed it to the side.

13 MS. JONES: -- tabling those.

14 THE COURT: Right.

15 MS. CASSIDY: Right.

16 THE COURT: Do you have enough to have a sampling
17 for the immigration?

18 MS. JONES: We can -- we can look at what we have
19 and we can try to focus on the -- in our next like -- we can
20 try to focus on pulling out ones that we think are good
21 examples.

22 So we can try to do that and then send them over to
23 defense counsel separately and just say, what's your position
24 on these? Privileged? Not privileged?

25 And so far I think they've basically been, for the

1 most part, saying it's privileged.

2 THE COURT: Right. And then the crime fraud
3 exception argument? Does that add to --

4 MS. JONES: Your Honor, the current fraud
5 exceptions to a large part depend on the facts of the
6 investigation, which AUSA Pillmar and I are not a part of.

7 Like, the arguments about -- and that were put in
8 the memo about, you know, someone has been living in the
9 United States for an X amount of time and the statements in
10 her application that she'd been complying with immigration
11 laws are not true, that is something that is like, beyond the
12 scope of what the taint team can do. I mean, we can --

13 THE COURT: I guess I still don't understand that
14 because how do I get to -- okay.

15 So just again, sort of you know, glossing over the
16 details, right. So the overall theory that there were a
17 variety of efforts to intimidate, threaten, harass, you know,
18 many, many people, sort of, you know, sort of the one thread
19 that runs through this case.

20 And just taking the example that's here, these --
21 the drafts of letter, you know, emails, letters that are then
22 -- I don't really understand what it is, but these letters
23 that are sent from seemingly from Mexican attorneys.

24 I mean, how -- without looking at the documents
25 that are the ones that the privilege would be waived by this,

1 how -- I don't know how to make that connection. So, you
2 know, I understand what you're saying, right? They have the
3 big picture. They know what all the documents that have
4 become public, or at least been released to the, you know,
5 all the parties here.

6 But without looking at a document, which is
7 something that the trial team can't do until the decision is
8 made, how do you make these decisions? I mean, I --

9 MS. JONES: Well, Your Honor, some of --

10 THE COURT: -- I'm not sure.

11 MS. JONES: -- some of these -- I would say that
12 nothing that we've discussed here today contains privileged
13 content. There is no reason why the prosecution team
14 shouldn't be here. I mean, I --

15 THE COURT: Okay. But what are the -- so, you can
16 tell me what they're going to tell me.

17 MS. JONES: And so, and when I -- in other cases
18 where there has been dispute about privilege, the prosecution
19 team, the trial team is perfectly able to litigate those
20 issues that relate to the law without seeing the documents
21 here.

22 Again, to the extent that we need to do an in-
23 camera process and we need to talk about specific documents,
24 we are here and that's our job, and we are ready to do it.

25 But to the extent that there's litigation about

1 like, is there a valid, you know, attorney/client
2 relationship that common interest would apply, which you
3 know, was litigated in the *FIFA* case, and there was a hearing
4 and the trial team handled that hearing, and to the extent
5 that there was anything relied on, I think specific documents
6 that's handled in camera, outside the presence of the public
7 or the trial team, and that can be dealt with.

8 But the fact that whether or not there is an
9 attorney/client relationship, the scope of that relationship,
10 the -- what waives or what doesn't waive that relationship,
11 those are not privileged in of themselves, and there's no
12 reason why even if they are not taking the lead, that the
13 prosecution team isn't more involved in what's going on right
14 here today.

15 MS. CASSIDY: Your Honor, this is exactly what puts
16 us sort of in a bind is that the prosecution team argues,
17 well, there's crime fraud. They haven't seen the documents.
18 They haven't articulated what communications are in
19 furtherance of a supposed crime or fraud. And then we are
20 trying to respond in the abstract.

21 I mean, there are, you know, hundreds or if not
22 thousands of emails with the attorneys that they have said,
23 oh, okay, these Mexican attorneys, that's a crime of fraud.

24 I mean, am I -- I don't think I'm the one who
25 should be putting forth saying -- I assume you're saying that

1 this document is --

2 THE COURT: Yeah, I mean, the crime fraud is a
3 little bit of a challenge here right, because most of this
4 has been up to the defendant to say that it's privileged.
5 But the breach of the privilege by acts of criminal acts
6 would be really from the government.

7 So I just --

8 MS. CASSIDY: And that is the --

9 THE COURT: But I don't, I mean, I just -- sorry if
10 I'm, you know, have a mental block on this.

11 I don't understand how I could make an assessment
12 about a particular document without seeing the document on
13 the group of documents that the government is saying there's
14 a crime fraud exception.

15 Because are you saying, okay, look, there were
16 these -- what's in here, right? There is this email -- the
17 email with the drafts, and then seemingly sent by Mexican
18 attorneys.

19 And okay, because these letters were sent, any
20 communications involving these lawyers are -- must be the
21 crime fraud? I don't know how you can say that.

22 I mean, I don't know what the -- I have no idea
23 what these lawyers did except for what's being suggested
24 here. So, I don't know. Maybe they're real estate lawyers.
25 Maybe they're -- maybe they incorporated company.

1 I mean, I don't know what they did, and without
2 looking at the document, how do I know that that was in
3 furtherance of a criminal act?

4 I mean, it's already hard to read the documents
5 that are here. I don't even really understand them because
6 if you -- I mean, I'll just tell you what my sort of
7 take/question is, right.

8 So there is the opening -- of course I can't find
9 it as I try to say it. But there is the opening paragraph,
10 which seems very confusing, suggesting that the author is the
11 prosecutor, I guess is what this is supposed to be.

12 But then the rest of it, I mean, people send cease
13 and desist letters all the time, and it doesn't mean that
14 there is any -- that that's a crime. That that's harassment.

15 I mean, you know, people hate getting them and they
16 argue, but so what? I mean, it's just, it's not a crime in
17 and of itself.

18 Now maybe to, I guess Ms. Jones your point, you
19 know, maybe the trial team could put it in a more of a
20 context of the overall acts that are alleged here, and so
21 then contextually it would have more significance.

22 The most problematic line in these letters, I don't
23 know, at least from just reading all of this is, now for
24 example I'm looking at 256-3, you know, I'm the chief
25 attorney of a criminal investigation in Mexico, you know, et

1 cetera. That's the draft, and then the letter has that
2 sentence in it. Anyway --

3 MS. JONES: Your Honor, the trial team has asked
4 for oral argument on this motion.

5 And again, AUSA Pillmar and I, we are not part of
6 the litigation team.

7 That's the whole point of us, is that we're
8 supposed to be separate and apart from them and focusing on
9 the review of the documents.

10 So to the extent that there -- you want our oral
11 argument on this motion --

12 THE COURT: No, what I want to know is, how do I
13 make a decision and take the arguments that are being made,
14 which is a serious argument that the lawyers were engaged in
15 criminal activity, and make a decision about that based on
16 the documents that the trial team has, when we don't -- the
17 trial team does not know what the documents are?

18 Now maybe the answer is some permutation of what we
19 have talked about, which is you give me the documents, I have
20 a conversation or oral argument, whatever it is, you know,
21 with the trial team, and I piece it together.

22 But it's hard to get it -- to get what defense
23 counsel's view is, you know, if it's -- you know, their -- I
24 don't know. I don't know what the right word is.

25 But if you can't speak freely because you're like,

1 okay, half my brain can talk to Ms. Jones because she knows
2 all this, and my other have, you know, can talk to Ms. Penza
3 because she knows that. But the twain shall never meet. So,
4 all right.

5 I mean, I'm trying to tell you what the practical
6 problem seems to be from my side, you know, my perspective.
7 So I'm open to hearing whatever your suggestions are, and I
8 think, you know --

9 MS. JONES: Your Honor, I think we need to start
10 moving documents to an in-camera review for you.

11 So I think what we will do is we will give the
12 defense counsel our final list of like, we have like
13 considered their statements that these are, in fact,
14 privileged, we'll confirm it, and we'll say look, these are
15 where we are in dispute.

16 And because we are in dispute about what the law is
17 on privilege and how that applies to these particular
18 documents, and then we'll just -- and then I think that it
19 will be upon the defendants to justify to you why these
20 particular documents are privileged.

21 THE COURT: Okay. So that will be for tranche --
22 what I'm going to call tranche A and tranche B.

23 MS. JONES: Yes. And we will try to identify
24 additional immigration documents to --

25 THE COURT: Okay.

1 MS. JONES: -- include within that, so that there
2 is a more of a sampling.

3 THE COURT: Okay. So I think that is the way to
4 go. Defendant, do you disagree?

5 MS. CASSIDY: And I would be --

6 THE COURT: Or do you have a different suggestion?

7 MS. CASSIDY: No. Would that be in a submission to
8 the Court, that these are the documents that we believe that
9 there is a dispute on?

10 THE COURT: You all are going to have a
11 conversation.

12 MS. JONES: No, we are going to -- we are going to
13 tell you, these are the ones we do not agree with your
14 privilege designation. And then you provide the
15 justification to the Court as to why these are privileged.

16 MS. CASSIDY: As long as that does not involve the
17 documents that are -- that they're arguing are subject to
18 crime fraud, I'm okay with that procedure.

19 THE COURT: Okay. So I think -- so to me there's
20 two big pieces here, right? One is your assertion of
21 privilege. So that's what we're talking about right now.

22 MS. CASSIDY: Correct.

23 THE COURT: And I think at least a sampling would
24 work. And, you know, maybe for some of these it's not even
25 really that much. You know, it sounds like a lot because

1 it's the email chains, but --

2 MS. JONES: But I think we should get some legal
3 precedent sort of going, and then we'll see -- then I think
4 hopefully that will help expedite further review if we know
5 that this is -- we had this disagreement, but it's been
6 resolved and now we have to move forward.

7 THE COURT: So I think that's true on all the ones
8 that are the assertion of privilege. It may be that you need
9 some details filled in that only the trial team has. Maybe
10 you have to get them from the crime fraud. This I have a
11 harder time thinking about how this happens, because this is
12 a burden on you.

13 MS. CASSIDY: Right.

14 THE COURT: Because you're suggesting that it's the
15 exception, and yet you're saying that the trial team is the
16 group that knows about it, and yet they can't look at the
17 documents. And I mean, what do I say?

18 Even hypothetically I say, okay, those attachments
19 to these submissions on privilege, yeah, that looks like a
20 crime.

21 What does that do, except if there are other
22 versions of this? You know, there is enough of a showing to
23 say that we should -- that there's some kind of waiver. But
24 what does that mean?

25 And then I take other documents and I say, oh look,

1 those are other iterations of letters sent to -- I'm making
2 this up. I have no idea if this happened.

3 But look, you know, these letters -- these are
4 similar letters that were sent to other individuals with a
5 similar kind of, in quote, threat.

6 So but, you know, it seems like the -- I'm not
7 sure, but reading the brief seems like the trial team would
8 like the crime fraud exception to have a bigger impact. And
9 you don't know.

10 MS. CASSIDY: Right. I mean --

11 THE COURT: Because -- go ahead. Sorry.

12 MS. CASSIDY: Yeah. My sense is that the taint
13 team's job is to look at the documents and see if there's a
14 basis to overcome the privilege.

15 And one of those basis could be crime fraud. I
16 don't think they need all of the information that the
17 prosecution team has in order to make that application to the
18 Court.

19 MS. JONES: Your Honor, that's not how crime fraud
20 works.

21 It's like, yes, if a document looked like on its
22 face, you know, client A is writing to a lawyer, hey, I'm
23 committing a crime, you help me, that's fine.

24 But without knowing like what the actual -- the
25 facts are behind the case, like a lawyer -- crime fraud can

1 apply even if a lawyer isn't aware of that he's furthering
2 the crime.

3 So the fact that there is -- if a crime has been
4 committed and these are communications are being used as part
5 of that then it doesn't really -- like, you may not
6 necessarily see from the face of an email that -- or realize
7 the significance if you don't know the bigger picture of what
8 actually --

9 THE COURT: Right.

10 MS. JONES: -- what the crime is.

11 THE COURT: So this is your point, if I -- this
12 question about the trial team is the better able, more
13 informed for contextualizing the communications.

14 MS. JONES: Right, and --

15 THE COURT: But without having the communications,
16 which they're not allowed to do, how do they do that?

17 MS. JONES: Well, I think they managed to already
18 show you that it appeared that a crime has been committed,
19 and --

20 MS. CASSIDY: Your Honor, if I may just add one
21 thing?

22 THE COURT: We haven't had that conversation yet.

23 MS. CASSIDY: I don't think they've even alleged
24 what crime it would be.

25 THE COURT: Yeah. I'm not --

1 MS. CASSIDY: They're just saying crime fraud.
2 They're saying threats of harassment, and there's no
3 allegation of a crime. And I've been involved in crime fraud
4 litigation before. There's an allegation of an actual crime
5 that's been committed.

6 MS. JONES: And they should be here to be making
7 these arguments. Why are we dealing with this? This is like
8 -- this is a litigation matter.

9 THE COURT: Okay. I understand, Ms. Jones, you
10 don't like this position that you're in, but this is -- the
11 difficulty is, you're the one -- or you and your colleague,
12 and whoever is doing whichever -- are the ones who have seen
13 the documents.

14 And without that knowledge, I don't know how one
15 makes an informed statement about the documents, unless they
16 are very similar.

17 So yes, of course, Ms. Penza, Ms. Hajjar, whoever
18 else is working on the team could come in here and hopefully,
19 you know, bring me up to speed with what you all have
20 developed as your evidence theory that you, you know, have
21 shared with the defendants and, you know, could be on the
22 public record.

23 And I, you know, I agree with you that there is the
24 possibility that there might -- you know, something might
25 seem -- these are my words, but I think those are -- so

1 anyway, seem innocuous until you understand, well, you know,
2 this is person A who -- you know, something had happened,
3 they've been threatened, they were the victim, they were
4 whatever, and now when you add some kind of communication on
5 top of that it has a different significance than you know, if
6 it just went to somebody who was not part of all of that.

7 Or to take a totally different kind of example, in
8 other, you know say, in drug cases, often a lot of things are
9 said in code.

10 And, you know, without somebody to give you
11 essentially the translation, I wouldn't know what the -- it
12 would seem like, you know, I mean you -- I'm sure you
13 probably have all seen these kinds of things where they look
14 like almost like recipes.

15 Like, you know, there will be a communication like,
16 I'd like to order, you know, a pound of beef and pound of
17 pork.

18 And you think, all right, well you know, is that a
19 recipe for you know, dinner? Or no, what they're actually
20 doing is ordering drugs, right? You know, there's a lot of
21 that kind of thing going on.

22 So, yes, there are many communications that I might
23 need the context for. But without somebody who's seen the
24 document speaking to it, especially when the burden is on the
25 government, I feel I'm a little bit uncertain as to how this

1 can happen. I'm not opposed to hearing from your colleagues
2 on this.

3 What I wanted to do today was to try to see if we
4 could cut to the chase on some of this with some helpful
5 information from individuals who have, you know, seen the
6 documents.

7 MS. JONES: Well, I think we can move forward with
8 the procedure we discussed about the --

9 THE COURT: On the first -- yeah, the one, point
10 one, which is these various claims of privilege and your --
11 so it would be, you know, helpful to, in a minute, talk about
12 a time line. But crime fraud?

13 I mean, an oral argument based on this will fill in
14 some gaps but --

15 MS. CASSIDY: Your Honor, it's also --

16 THE COURT: -- I really don't know.

17 MS. CASSIDY: It's not the case that the taint team
18 has no context. I mean, they have obviously read the
19 government's brief, so they know what it is that they're
20 looking for. And then they have seen the privilege
21 documents.

22 So I don't really understand why they wouldn't make
23 -- be in the position to make an argument to Your Honor that
24 they think that crime fraud is, you know, vitiates from
25 privilege with respect to certain documents.

1 MS. JONES: Your Honor, we have -- I have read the
2 briefs. But, you know, we are not participating in the
3 witness interviews, we're not reviewing the other documents
4 that, you know, they're focusing on for trial. We're not
5 participating in the trial preparation. We're just focusing
6 on this.

7 THE COURT: All right, well --

8 MS. CASSIDY: I mean, you're sort of saying that
9 neither half of the government can meet its burden on crime
10 fraud. So --

11 THE COURT: Look, I mean, you know, I've spent the
12 last 15 minutes basically saying that. So this is the
13 government's burden.

14 And so maybe what makes sense, talk about the
15 schedule for the other documents, and then for you as the
16 taint team, to talk to your colleagues and if you think that
17 the way to get the information that would provide some more
18 context that would be helpful in the motion is just to come
19 back here and, you know, have them speak.

20 And then, you know, maybe that will make this a
21 pure question of law. I'm skeptical, given what the issue
22 is, but -- and the submission that's been made.

23 But, you know, I don't know. Maybe they have
24 helpful information that they could share that would help
25 with this.

1 If not, I really don't know -- I don't know where
2 we would go after that.

3 Okay. So in terms of the timing, so I think the
4 next step is -- or it's really maybe amplifying what you've
5 already done, is for the taint team to -- oh, well I think --
6 I'm sorry. You said you were waiting for some responses?

7 MS. JONES: We don't have a final list from
8 Defendant Raniere --

9 THE COURT: Right. Raniere. Okay.

10 MS. JONES: -- as to what documents he's asserting
11 privilege over.

12 THE COURT: Okay. So I know you're only hearing --
13 I don't know, you're sitting on the back bench, not on a
14 microphone.

15 UNIDENTIFIED SPEAKER: Sitting in the back here.

16 THE COURT: Not technically appearing, but what's
17 the schedule that you think that --

18 UNIDENTIFIED SPEAKER: I went through yesterday --

19 THE COURT: -- you can do?

20 UNIDENTIFIED SPEAKER: -- and a lot of the
21 documents I originally marked as privileged, I no longer
22 marked as privileged.

23 I am waiting on just -- it's about 30 emails, but
24 three email chains that I have to go over with my client, and
25 today was the first time I could see him.

1 THE COURT: Right. Because there --

2 UNIDENTIFIED SPEAKER: We have another appearance
3 tomorrow, so I could imagine that I get this done by
4 Thursday.

5 THE COURT: Okay. And is the delay because of
6 the --

7 UNIDENTIFIED SPEAKER: Yes.

8 THE COURT: -- difficulties with the MDC?

9 UNIDENTIFIED SPEAKER: I have not been able to see
10 him since Sunday. Whatever this -- not this last -- the
11 27th.

12 THE COURT: Okay. All right. So you're going to
13 get back as quickly as you can, but you think by the end of
14 the week?

15 UNIDENTIFIED SPEAKER: Thursday morning.

16 THE COURT: Okay.

17 UNIDENTIFIED SPEAKER: I can imagine Thursday.

18 THE COURT: All right. So that will be Raniere.
19 What about Ms. Bronfman's documents?

20 MS. JONES: So we have gone back -- like we've gone
21 back and forth, and you know, as I've said, we've got a total
22 of 322.

23 We haven't gone through with the second tranche, we
24 haven't gone back to look again and take a second look out of
25 the ones she is arguing are privileged.

1 So we'll do that and figure out if we are -- want
2 to, you know, rethink our position based on the explanation
3 she's provided as to why it's privileged.

4 And then we will tell her, we will try to give her
5 an answer by Monday as to what we are not going to agree on,
6 and we will also try to get her before then, an additional
7 set of immigration documents.

8 It won't be all of them, but we'll try to get
9 through a number of them so then she can come back and say
10 whether or not she disagrees with our not privileged
11 designation.

12 And then we'll have a list of -- these are the
13 documents in dispute, and then she can provide a copy of them
14 to you in-camera with an explanation, which we should be
15 copied on the explanation so we can argue, because I think
16 there are going to be legal disputes as to what -- whether or
17 not they're privileged -- whether or not these documents are
18 privileged.

19 And I think it will come down to are these in fact
20 -- is there a valid common interest agreement, or have they
21 met that burden, and whether or not certain documents fall
22 within the scope of her privilege.

23 So I think there will be like -- we would like to
24 see what they submit to you and their arguments as to why
25 they're privileged, respond, and then you can make your

1 determination after reviewing the documents.

2 THE COURT: What's defendant's counsel's thought
3 about that?

4 MS. JONES: Oh, also, I want to raise that a lot of
5 these are going to be NXIVM's privilege, so it's not clear to
6 me whether or not Ms. Bronfman or Mr. Sullivan is going to be
7 making the submission to you.

8 Your Honor, I mean, I don't object to providing the
9 taint team with my explanation of why it's privileged, or
10 case law on why it's privileged.

11 If I'm going to go beyond what's already in the
12 document and reveal additional privileged information that
13 would support my argument, you know, and my burden of
14 establishing the privilege, then I do think that that should
15 just be made ex parte.

16 MS. JONES: I thought that was the whole point of
17 us.

18 MS. CASSIDY: Well, you know, I don't know what --

19 THE COURT: Privileged information that's not --

20 MS. CASSIDY: -- whether there's information
21 that --

22 THE COURT: -- in the documents.

23 MS. CASSIDY: -- flows between the taint team and
24 the prosecution team. I mean, it certainly seems like --

25 THE COURT: It's supposed to be a one-way street.

1 MS. JONES: And it is, Your Honor.

2 THE COURT: Them to you, not you to them. Except
3 for asking questions about information.

4 MS. CASSIDY: Them to -- the taint team to me.

5 THE COURT: No, the --

6 MS. CASSIDY: The prosecution team.

7 THE COURT: -- information should be going from the
8 trial team to the taint team, and the only thing going from
9 the taint team to the trial team, until a question of
10 privilege is resolved, is possibly a solicitation of
11 information.

12 Okay. So you're saying -- I mean, where are you?

13 MS. CASSIDY: I mean, I'd have to see the
14 documents to see what they're challenging and, you know,
15 where we come out on this.

16 THE COURT: All right. Yeah. I guess we can
17 reserve on that, whether --

18 MS. CASSIDY: Yeah.

19 THE COURT: All right. But what, in terms of a
20 time line? You're suggesting -- the government is suggesting
21 that --

22 MS. CASSIDY: Suggesting they'll give us --

23 THE COURT: The list.

24 MS. CASSIDY: -- the list by Monday. I would say by
25 the following Monday.

1 THE COURT: Okay. I'm sorry, let me go back, Ms.
2 Jones. Will that include the immigration in your list? At
3 least some?

4 MS. JONES: At least some.

5 THE COURT: Okay.

6 MS. JONES: I don't know if we'll get through all
7 the immigration documents.

8 There are a number of them, but we definitely try
9 to mark some more immigration documents so we can have a
10 bigger selection to -- for you to review.

11 THE COURT: Okay. And so just I mean, you're free,
12 the 18th is the holiday I think, right? Isn't that
13 President's Day? Yeah.

14 And then is there a suggestion that right then
15 you'll just give me the documents that you disagree about?

16 MS. CASSIDY: Yes.

17 THE COURT: Okay. All right.

18 So that will be an ex parte submission. You'll
19 have to see.

20 I mean, I guess the taint team can see some,
21 possibly all of it.

22 Do you want to respond to that? Do you want to
23 just have arguments?

24 MS. JONES: I do, Your Honor, because we have our
25 reasons why we've marked these as non-privileged, and we will

1 have our reasons for why we haven't agreed with them when
2 they objected to it, because I think we just have a different
3 views on the law and how the privilege applies to these
4 documents.

5 THE COURT: Okay. Given -- I mean, you should be
6 able to give me that pretty quickly, right?

7 MS. JONES: After we get -- after we see what there
8 is --

9 THE COURT: Yeah, but you already know why you
10 think that they are privileged and what your different review
11 is. Sorry, why they are not privileged in your different
12 view.

13 MS. JONES: Uh-huh.

14 THE COURT: Just looking at a --

15 MS. CASSIDY: Your Honor, the Monday is the
16 President's Day?

17 THE COURT: Uh-huh.

18 MS. CASSIDY: I might want to do it the Tuesday,
19 just to be sure that I can confer with NXIVM counsel, because
20 I don't know their -- I don't know his schedule.

21 THE COURT: All right. The government, if you have
22 anything you want to say can you do it by Friday, the 22nd?

23 MS. JONES: Your Honor, can we have the following
24 Monday? I just, that week is a holiday. It's for the --

25 THE COURT: Oh, the schools?

1 MS. JONES: School is closed that entire week.

2 THE COURT: And, you know, the downside of all of
3 this you're saying basically, you know, it's not going to be
4 -- it's going to be three weeks before I get what you're
5 submitting. And what's your trial date again?

6 MS. JONES: April --

7 MS. CASSIDY: April 29th.

8 THE COURT: All right. So it basically gives you
9 two months.

10 MS. CASSIDY: But this is only on the first two
11 tranches of documents --

12 THE COURT: I know.

13 MS. CASSIDY: -- and I assume there are many more.

14 I mean, I don't have a sense, I mean, from what
15 they have said today, I assume that these are the only
16 documents that they've gone through document by document.

17 I don't know whether there's a whole -- you know,
18 are there 10,000 documents that they can say, okay, we agree
19 those are privileged. We're not discussing those.

20 I mean, I think it will be helpful to have some
21 sense of how far -- how many more rounds of this --

22 THE COURT: I mean, that was sort of where we tried
23 to start.

24 MS. CASSIDY: -- there might be.

25 MS. JONES: And, Your Honor, we've been -- our

1 focus is on identifying what's not privileged.

2 Not, you know, just trying to -- and if we see a
3 document and it looks clearly privileged, we've been marking
4 it privileged. But again, we're doing searches to try to
5 figure out like, what is not privileged here.

6 And so we have identified what we have so far -- I
7 mean, we do have like, I don't know how many more we have,
8 like in the queue of what we've like continued to review and
9 haven't sent over yet, but I think when we do this back and
10 forth, that's kind of what we shift our focus to instead of -
11 -

12 THE COURT: Do you have any approximation of --

13 MS. JONES: Look. I think there are about -- I
14 think there are still about over 30,000 -- 35,000 documents I
15 think that still have not been reviewed.

16 THE COURT: I'm trying to understand. Reviewed
17 means --

18 MS. JONES: That we've looked at it and we've
19 marked it either privileged or not privileged.

20 THE COURT: Okay. What about --

21 MS. JONES: All right --

22 THE COURT: How many numbers are showing up in your
23 searches that are, from your perspective, arguably not
24 privileged? I mean, that's really -- right?

25 Because from defendant's perspective, they don't

1 want to hear that a month from now and a month out from trial
2 or a month out, whatever that is, you know, two months out
3 from trial, that there's --

4 MS. JONES: Your Honor, they have --

5 THE COURT: -- some enormous number.

6 MS. JONES: They have all the documents we have. I
7 mean, it's not like we're sitting on them.

8 Like, they are just as capable as we are as like
9 conducting searches to see what's in there. And I know it's
10 they're not, they're saying --

11 THE COURT: Wait, they've asserted the privilege.
12 They want to know what you disagree with, right?

13 MS. JONES: No, no, no. We are saying what's not
14 privileged, and then they say whether or not they agree with
15 us. They are not asserting privilege over anything.

16 THE COURT: I thought that was the whole
17 segregation point.

18 MS. JONES: No.

19 THE COURT: These documents were segregated.

20 MS. JONES: They are segregated --

21 MS. CASSIDY: They're segregated as potentially --

22 THE COURT: And then --

23 MS. CASSIDY: -- privileged.

24 THE COURT: -- on the working assumption that the
25 documents that involve various attorneys and law firms,

1 there's a strong likelihood that those are privileged.

2 That's why they were segregated.

3 Now you're going through and saying, oh, the
4 example you gave earlier, which is that, oh, there are other
5 people on this chain so the privilege has been lost.

6 And then you identify those to them or whatever,
7 crime fraud, or whatever the argument is that you're making.
8 And then they're saying, no, you're incorrect about the
9 waiver.

10 MS. JONES: No, Your Honor, these documents --

11 THE COURT: Or that, I'm sorry, they say there's a
12 privilege and it hasn't been lost. That sort of thing.

13 MS. JONES: These documents are potentially
14 privileged just because of the search terms. So if anywhere
15 in the document or the attachment, a lawyer's name appears,
16 it's in our pile.

17 THE COURT: Right.

18 MS. JONES: So it's not -- they have made very
19 clear that they have not asserted privilege over all these
20 documents; that they're waiting for us to say what's not
21 privileged so they can say whether or not they agree or not
22 agree with it.

23 THE COURT: Okay. The practical point is, they
24 don't want anything to be given to the trial team or the
25 world if it is privileged.

1 And what I think, and you correct me if I'm wrong,
2 your concern increasingly is, the closer you get to trial,
3 you don't want to hear, oh, look, we don't think this group,
4 despite the fact that there are these attorneys' names on it,
5 or law firms' name on it, or domain names and all the other
6 various permutations which you identified lawyers, those are
7 not privileged, and now suddenly we have another whatever,
8 one, two, three, however many thousand documents, or hundreds
9 of documents that we have to deal with for trial.

10 MS. CASSIDY: That's correct.

11 THE COURT: And that's the practical consideration.

12 And whether the dance is, you know, you haven't
13 asserted privilege but they have -- as I understand this
14 exercise, the defendants have said, these are attorneys and
15 law firms that our clients dealt with, and you segregated
16 that because attorney/client privilege. And now you're doing
17 the analysis of that.

18 So the point is, at what speed and with what degree
19 of accuracy and breadth are you getting through your
20 analysis. Right? Because --

21 MS. JONES: Your Honor, we're moving as quickly as
22 we can with the resources that we have. And again --

23 THE COURT: Again, I will flag, and this is not
24 your issue, the resources that you have has been something
25 that's been a concern for me the whole time because it's a

1 big case with a lot of lawyers, a lot of defendants.

2 And if you can't do what you need to do, and I have
3 no idea whether you can or can't, then your office should be
4 staffing this in a way that lets you do it.

5 That's really, you know -- and now, that's you
6 know, a professional and an administrative decision for the
7 US attorney's office to make. But --

8 MS. CASSIDY: And just to that --

9 THE COURT: -- it's been an issue along the way, if
10 this is too much for anybody to do. But, okay. So --

11 MS. CASSIDY: Just to that point, Your Honor.

12 I mean, some of these documents that are in their
13 queue to review, they were seized at the beginning of this
14 year. And while they --

15 THE COURT: 2019.

16 MS. CASSIDY: No, sorry. The beginning of last
17 year.

18 THE COURT: Yes.

19 MS. CASSIDY: The beginning of 2018.

20 And while I realize that, you know, they seized
21 them from my client's email account, and she hadn't been
22 indicted yet so they weren't going to ask me for a list of
23 attorneys at that point, all of the documents seized from Ms.
24 Salzman's house, she was well aware that a search warrant was
25 executed, so they could have asked her for a list of

1 attorneys --

2 THE COURT: Right.

3 MS. CASSIDY: -- and been going through and doing a
4 privilege review all year --

5 THE COURT: Right. So I think --

6 MS. CASSIDY: -- long.

7 THE COURT: -- what you're flagging goes to the
8 arguments that are most likely going to be made to Judge
9 Garaufis that, enough is enough and there has to be a line
10 drawn on production and what they can reasonably rely on at
11 trial.

12 And we've already had this conversation in various
13 iterations, including the fact that there was a very extended
14 period in which the government itself was getting practical
15 access, right?

16 The seizures happened, then there was some period
17 of discussion, negotiation, then there was a need for an
18 outside vendor, then there was the technical loading of the
19 documents on the vendor's machinery, you know, software or
20 whatever it was, breaking off the ones that the vendor
21 couldn't deal with and are apparently down at Quantico, and I
22 have no idea what's going on with that.

23 And here we are, and you've -- this is not a
24 criticism of the work. This is a look at the time line,
25 which is true, the government has had these documents a long

1 time.

2 That being said, I don't think it's going to be my
3 -- it's not my decision to say where this line is drawn.

4 We've talked about it a good bit before as to other issues.

5 So, again, the question is, as a practical matter
6 is there any way for me and the defendants to get some sense
7 of where the -- and how the taint team, you see yourself
8 working through this enormous number of documents?

9 So one thing we've talked about is, all right, once
10 we get some sample documents and can have a resolution, then
11 you could apply those rulings to some of the documents.

12 But there is a lot of other documents behind that
13 and I, you know -- I mean, you know, there's different
14 scenarios.

15 One, you're looking for the ones that are the most
16 likely to not be privileged, right? So you looked for --
17 your first example. You looked for change of documents that
18 had non-attorneys on it, right, and you all kind of worked
19 your way through that. And now you're in this next category
20 where you can group it.

21 But is there, you know, is behind that
22 communications that you agree probably are privileged and
23 that's it? Or are you just going to keep working all the way
24 -- I don't know, until whenever I guess the trial judge says
25 that's it? I mean, the numbers are huge. The numbers in

1 this case have always been huge.

2 MS. JONES: And I know, that's why we were
3 hoping --

4 THE COURT: But there's a trial date.

5 MS. JONES: That's why we were hoping to get some
6 of these issues resolved as a matter of law.

7 THE COURT: Well, they may be matters of law, but
8 they are going to be tied to the documents.

9 But what we, defendants and I have heard is, the
10 ones that you all worked through, the ones that you are in
11 the process of identifying and I think are trying to get a
12 handle, or I'm trying to get a handle for my schedule at a
13 minimum as to, is there a whole other group of documents that
14 you suspect are not privileged and that you're going to raise
15 that, and there will be a whole other round of analysis, or
16 is this most of the work?

17 And, you know, once we resolve this so, you know, a
18 month out from -- whatever. A month from now, or something
19 like that. You know, they will know where they stand with
20 regard to those segregated documents.

21 MS. JONES: Your Honor, I think we need to discuss
22 amongst ourselves if there is a way that we can mass-tag
23 documents and you know, maybe we'll try doing that forward,
24 but I think -- well, we'll try that.

25 We'll see if we can mass-tag documents, but I think

1 what's going to happen is that we're going to go back and
2 forth, and we're saying mass-tagging them, not privileged.
3 We're going to mass-tag them privileged.

4 So it's just going to be, if we do it by -- there
5 doesn't -- we would like to get away from a document by
6 document analysis, but we're not getting anything from
7 defense counsel other than, let's do this document by
8 document.

9 We gave them a tranche of documents and then it
10 takes them, you know, a week or two weeks, or three weeks to
11 get back to us saying what they agree on. So --

12 THE COURT: All right. I'm not -- I just, I don't
13 think there's any way in which the responsibility for this
14 being a detailed process and slow can be put on to
15 defendant's counsel, given the very long time the United
16 States government had the documents.

17 It just doesn't seem balanced to say that. It's
18 labor intensive and that's what you're working through, but -
19 - all right.

20 So as a practical matter what we're going to do is,
21 you're -- on the privilege claims that defendants are
22 asserting and government is questioning, the taint team is
23 going to give the documents, or identify the documents by the
24 11th. The government -- I'm sorry.

25 The defendants will respond and give me those which

1 you have not come to an agreement by the -- well, by the
2 19th. And then the 25th if the government wants to say
3 anything about that.

4 And then crime fraud, where are we going to leave
5 this? You're going to talk to your colleagues and --

6 MS. JONES: I think that -- I think the prosecution
7 team needs to be involved in these arguments about crime
8 fraud.

9 THE COURT: And you think -- I mean, I guess my
10 thought is, all right, we'll try but I don't know if it's
11 going to get us anywhere.

12 MS. CASSIDY: I think it's a waste of time.
13 They've put in their submissions, they've said what they can
14 say without having seen the documents.

15 So unless the taint team wants to make a separate
16 submission identifying the documents that they think, in line
17 with the prosecution team's you know, factual arguments --

18 THE COURT: Right.

19 MS. CASSIDY: -- are subject to crime fraud --

20 THE COURT: Right.

21 MS. CASSIDY: -- I don't know where that -- I
22 don't think that gets us anywhere to have a discussion.

23 THE COURT: Do you know what their availability is?

24 MS. JONES: I don't. I know they have something
25 tomorrow, but --

1 MS. CASSIDY: We have a conference tomorrow.

2 THE COURT: You'll all be here. What time is --
3 what time is that?

4 MS. CASSIDY: Our conference tomorrow is at 11:00
5 a.m.

6 THE COURT: At 11:00. Is it unreasonable to say,
7 pick this conversation up after that, or --

8 MS. JONES: I don't know what their schedule is,
9 Your Honor. I hate to talk -- speak for them because I
10 haven't -- I didn't even raise this with them. All I know is
11 that they had a -- they were going to see Judge Garaufis
12 tomorrow.

13 THE COURT: I'm just looking at the schedule.
14 Everybody -- Friday? I mean, I'm on criminal duty so I have
15 to be a little bit flexible.

16 It could either be fairly early in the morning or --
17 - I don't know, it's hard to say.

18 MS. CASSIDY: We could check with the prosecution
19 team tonight and see if they're able to do it tomorrow after
20 the court appearance. I mean, I don't know.

21 I don't have a sense of how long that court
22 appearance will take, but it should certainly be finished by
23 1:00, I would think.

24 MS. JONES: And you're contemplating that we, that
25 we all show up, taint team and prosecution team.

1 THE COURT: I guess you might as well learn what
2 they know.

3 MS. JONES: Okay.

4 THE COURT: Yeah. So I mean, why don't you touch
5 base with them, everybody.

6 We could do it tomorrow at lunch, or -- and so you
7 should just call my chambers and let me know. Or Friday, I
8 would say --

9 MS. CASSIDY: If we want --

10 THE COURT: It really depends on your schedule.
11 I'm in criminal duty so it's pretty unpredictable. The
12 morning, you know, I hate to say this, the mornings are
13 usually not so busy.

14 So like right after whatever happens in
15 arraignments, or we could start, I could go there, come back.

16 MS. CASSIDY: If we want Raniere's team here, I
17 don't believe they're available on Friday.

18 THE COURT: Oh, you're not. Okay.

19 UNIDENTIFIED SPEAKER: I'm not. I'm sorry.

20 THE COURT: Okay.

21 UNIDENTIFIED SPEAKER: I'm available all Thursday.
22 I do expect -- I do think the conference in front of Garaufis
23 is going to be relatively short tomorrow. So --

24 THE COURT: Okay.

25 UNIDENTIFIED SPEAKER: And I really could just

1 email them now and ask if they're available.

2 UNIDENTIFIED SPEAKER: I'm doing that right now,
3 Judge.

4 UNIDENTIFIED SPEAKER: Oh, okay.

5 THE COURT: Okay. All right. If not I would say,
6 then how is Monday at 12:30?

7 MS. CASSIDY: That's fine for me.

8 UNIDENTIFIED SPEAKER: That's fine for us.

9 MS. JONES: Right now it looks okay for the taint
10 team.

11 THE COURT: Okay. So why don't you just give us a
12 call in the morning, whether you're going to come by. You
13 know, I have some conferences on. They don't look like
14 they're going to be that long.

15 I certainly have the lunch break. Or, yeah, Monday
16 at 12:30. Just let me know which one you want to do.

17 MS. JONES: So either tomorrow or Monday at 12:30?

18 THE COURT: Yes.

19 MS. JONES: Okay.

20 THE COURT: All right. What I've told you my
21 impressions of this.

22 If you think I'm misguided, we should reorient --
23 look at this some other way that we haven't talked about.
24 Does anybody have, other than what we've already talked
25 about, any practical or impractical but interesting

1 suggestions about how to do this?

2 No? All right. Well, if something -- if you do
3 have an insight, think about it differently, et cetera, you
4 can let me know. All right. Anything else?

5 Oh, sorry. I mean, obviously I should -- if your
6 clients want to come, I guess they'll be -- are they --
7 they'll be here for that conference?

8 MS. CASSIDY: Mine will. Yes.

9 THE COURT: You should work out that they could
10 attend.

11 MS. CASSIDY: Thank you.

12 THE COURT: Right? I mean, they weren't noticed
13 for this in particular, but hopefully we can, you know, put
14 it on the calendar, let the marshal know, and go from there.
15 All right. Anything else?

16 No? All right. I appreciate you staying late.

17 MS. JONES: Thank you.

18 MS. CASSIDY: Have a good night.

19 UNIDENTIFIED SPEAKER: Thank you, Your Honor. Good
20 night.

21 (Proceedings concluded at 6:19 p.m.)

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2 I, CHRISTINE FIORE, court-approved transcriber and
3 certified electronic reporter and transcriber, certify that
4 the foregoing is a correct transcript from the official
5 electronic sound recording of the proceedings in the above-
6 entitled matter.

7

Christine Fiore

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9 _____ February 7, 2019

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Christine Fiore, CERT

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